

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

DAVID W. WILSON,
Plaintiff,
v.
THERESA CISNEROUS, et al.,
Defendants.

Case No. 1:21-cv-01455-EPG (PC)
FINDINGS AND RECOMMENDATIONS,
RECOMMENDING THAT PLAINTIFF'S
APPLICATION TO PROCEED IN
FORMA PAUPERIS BE DENIED AND
THAT PLAINTIFF BE REQUIRED TO
PAY THE \$402.00 FILING FEE IN FULL
IF HE WANTS TO PROCEED WITH
THIS ACTION
(ECF No. 6)
OBJECTIONS, IF ANY, DUE WITHIN
TWENTY-ONE (21) DAYS
ORDER DIRECTING CLERK TO
ASSIGN DISTRICT JUDGE

I. BACKGROUND

David Wilson ("Plaintiff") is a state prisoner proceeding *pro se* with this action. This action was commenced on September 22, 2021. On September 27, 2021, Plaintiff filed an application to proceed in forma pauperis. (ECF No. 6).

The Court finds that Plaintiff had at least three "strikes" prior to filing the action and that Plaintiff was not in imminent danger of serious physical injury at the time he filed the action. Therefore, the Court will recommend that Plaintiff's application to proceed in forma pauperis be denied and that Plaintiff be required to pay the filing fee of \$402.00 for this action in full if he wants to proceed with this action.

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1 **II. THREE-STRIKES PROVISION OF 28 U.S.C. § 1915(g)**

2 28 U.S.C. § 1915 governs proceedings *in forma pauperis*. Section 1915(g) provides
 3 that “[i]n no event shall a prisoner bring a civil action … under this section if the prisoner has,
 4 on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action
 5 or appeal in a court of the United States that was dismissed on the grounds that it is frivolous,
 6 malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is
 7 under imminent danger of serious physical injury.”

8 In determining whether a case counts as a “strike,” “the reviewing court looks to the
 9 dismissing court’s action and the reasons underlying it.... This means that the procedural
 10 mechanism or Rule by which the dismissal is accomplished, while informative, is not
 11 dispositive.” Knapp v. Hogan, 738 F.3d 1106, 1109 (9th Cir. 2013) (citation omitted). See
 12 also O’Neal v. Price, 531 F.3d 1146, 1153 (9th Cir. 2008) (“no ‘particular formalities are
 13 necessary for an order that serves as the basis of [an involuntary] dismissal.’”) (quoting
 14 Yourish v. Cal. Amplifier, 191 F.3d 983, 986-87 (9th Cir. 1999)) (alteration in original).

15 **III. ANALYSIS**

16 *i. Strikes*

17 Plaintiff initiated this action on September 22, 2021. (ECF No. 1). The Court finds
 18 that, prior to this date, Plaintiff had at least three cases dismissed that count as “strikes.”

19 The Court takes judicial notice of Wilson v. California State Prison Corcoran, E.D. CA,
 20 Case No. 1:18-cv-00424, ECF No. 10, in which District Judge Dale A. Drozd found that
 21 Plaintiff had at least three “strikes” prior to filing the action. The action was filed on March 28,
 22 2018. Id. at ECF No. 1. On appeal, the Ninth Circuit denied Plaintiff’s motion to proceed in
 23 *forma pauperis* “because appellant has had three or more prior actions or appeals dismissed as
 24 frivolous, malicious, or for failure to state a claim upon which relief may be granted, and
 25 appellant has not alleged imminent danger of serious physical injury.” 9th Cir., Case No. 19-
 26 15237, ECF No. 7, p. 1.

27 The Court also takes judicial notice of: 1) Wilson v. Tilton, E.D. CA, Case No. 2:06-cv-
 28 01031, ECF Nos. 5 & 8 (dismissed for failure to state a claim); 2) Wilson v. Schwartz, E.D.

1 CA, Case No. 2:05-cv-01649, ECF Nos. 24 & 26 (dismissed for failure to state a claim); 3)
2 Wilson v. Dovey, E.D. CA, Case No. 2:06-cv-01032, ECF Nos. 11 & 13 (dismissed for failure
3 to state a claim); and 4) Wilson v. Veal, E.D. CA, Case No. 2:06-cv-00067, ECF Nos. 9 & 11
4 (dismissed as frivolous and for failure to state a claim).

5 *ii. Imminent Danger*

6 As Plaintiff had at least three “strikes” prior to filing this action, Plaintiff is precluded
7 from proceeding *in forma pauperis* unless Plaintiff was, at the time the complaint was filed, in
8 imminent danger of serious physical injury. The availability of the imminent danger exception
9 “turns on the conditions a prisoner faced at the time the complaint was filed, not at some earlier
10 or later time.” Andrews v. Cervantes, 493 F.3d 1047, 1053 (9th Cir. 2007). “Imminent danger
11 of serious physical injury must be a real, present threat, not merely speculative or
12 hypothetical.” Blackman v. Mjening, 2016 WL 5815905, at *1 (E.D. Cal. Oct. 4, 2016). To
13 meet his burden under § 1915(g), Plaintiff must provide “specific fact allegations of ongoing
14 serious physical injury, or a pattern of misconduct evidencing the likelihood of imminent
15 serious physical injury.” Martin v. Shelton, 319 F.3d 1048, 1050 (8th Cir. 2003). “[V]ague
16 and utterly conclusory assertions” of imminent danger are insufficient. White v. Colorado, 157
17 F.3d 1226, 1231-32 (10th Cir. 1998). See also Martin, 319 F.3d at 1050 (“[C]onclusory
18 assertions” are “insufficient to invoke the exception to § 1915(g)....”). The “imminent danger”
19 exception is available “for genuine emergencies,” where “time is pressing” and “a threat ... is
20 real and proximate.” Lewis v. Sullivan, 279 F.3d 526, 531 (7th Cir. 2002).

21 Additionally, “the complaint of a three-strikes litigant must reveal a nexus between the
22 imminent danger it alleges and the claims it asserts, in order for the litigant to qualify for the
23 ‘imminent danger’ exception of § 1915(g). In deciding whether such a nexus exists, we will
24 consider (1) whether the imminent danger of serious physical injury that a three-strikes litigant
25 alleges is fairly traceable to unlawful conduct asserted in the complaint and (2) whether a
26 favorable judicial outcome would redress that injury. The three-strikes litigant must meet both
27 requirements in order to proceed [*in forma pauperis*].” Stine v. Fed. Bureau of Prisons, 2015
28 WL 5255377, at *3 (E.D. Cal. Sept. 9, 2015) (quoting Pettus v. Morgenthau, 554 F.3d 293,

1 298-99 (2d Cir. 2009)).

2 Because Plaintiff is *pro se*, in making the imminent danger determination the Court
3 must liberally construe Plaintiff's allegations. Andrews, 493 F.3d at 1055 (9th Cir. 2007).

4 In his complaint, Plaintiff alleges that he is being subjected to overcrowding. Plaintiff
5 appears to allege that this overcrowding is causing him to suffer from unconstitutional
6 conditions of confinement such as excessive heat, contaminated drinking water, and black
7 dust/mold/parasites. Plaintiff also alleges that the COVID-19 prevention measures are
8 inadequate. Plaintiff also alleges that there is not enough room for walkers or wheelchairs to
9 turn around and maneuver around the bunks.

10 The Court finds that Plaintiff fails to sufficiently allege that, at the time he filed this
11 action, he was in imminent danger of serious physical injury.

12 First, the second to last thing Plaintiff complains of in his complaint is in regard to
13 receiving the Director's Level Response to his grievance. This occurred on December 31,
14 2020. However, the complaint is dated September 16, 2021, which is approximately nine
15 months later. The only more recent allegation Plaintiff includes is that, on August 23, 2021,
16 Pod 8 quarantined eleven prisoners next to Plaintiff's Pod 9. And, Plaintiff does not explain,
17 and it is not clear, how quarantining inmates in a separate pod presents a risk to Plaintiff. Thus,
18 the allegations in the complaint do not show that Plaintiff was in imminent danger of serious
19 physical injury at the time he filed his complaint.

20 Second, Plaintiff appears to be attempting to bring a class action for release (ECF No. 1,
21 p. 4), and many of his allegations involve risks to inmates in general, not specifically to
22 Plaintiff. Thus, these allegations cannot show that Plaintiff himself was in imminent danger of
23 serious physical injury at the time he filed his complaint.

24 Finally, most of the conditions of confinement that Plaintiff complains of do not show
25 that he was subjected to imminent danger at any time. Plaintiff alleges that he was subjected to
26 black mold/dust/parasites, but he never explains how this puts him at risk of serious physical
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1 injury.¹ He also alleges that the drinking water is contaminated, but he never alleges what it is
2 contaminated with² or how the contaminated water puts him at risk. He also alleges that there
3 is not enough room for wheelchairs or walkers to maneuver around bunks, but there are no
4 allegations suggesting that this puts him at risk of serious physical injury. Plaintiff also alleges
5 that he has been subjected to extreme heat, and this has caused dizziness and tension
6 headaches. However, the fact that Plaintiff suffered from dizziness and tension headaches does
7 not sufficiently show that he was in imminent danger of serious physical injury.

8 The closest Plaintiff comes to alleging imminent danger of serious physical injury is in
9 regard to his allegations regarding COVID-19. Plaintiff alleges that there is inadequate airflow
10 and an inability to properly social distance in the bunk area. However, it appears that sick
11 individuals are being quarantined. (ECF No. 1, p. 3). Moreover, Plaintiff alleges that he
12 already tested positive for COVID-19 (*id.* at 5), and there are no allegations suggesting that he
13 is currently being denied medical care. Thus, these allegations are insufficient to show that he
14 was in imminent danger of serious physical injury at the time he filed his complaint.

15 As Plaintiff is a “three-striker” and was not in imminent danger when he filed this
16 action, the Court will recommend that Plaintiff be required to pay the \$402 filing fee in full if
17 he wants to proceed with the action.

18 **IV. CONCLUSION, RECOMMENDATIONS, AND ORDER**

19 The Court finds that Plaintiff may not proceed *in forma pauperis* in this action.

20 Accordingly, it is HEREBY RECOMMENDED that:

21 1. Pursuant to 28 U.S.C. § 1915(g), Plaintiff’s application to proceed in forma pauperis
22 (ECF No. 6) be DENIED; and

23 2. Plaintiff be directed to pay the \$402.00 filing fee in full if he wants to proceed with
24 this action.

25 These findings and recommendations will be submitted to the United States district
26 judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within
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28 ¹ Plaintiff appears to allege that being exposed to these conditions causes a cough. (ECF No. 1, p. 6).

² Plaintiff may allege that it is contaminated with “Recycled Water,” but it is not clear what this means.

1 twenty-one (21) days after being served with these findings and recommendations, Plaintiff
2 may file written objections with the Court. The document should be captioned "Objections to
3 Magistrate Judge's Findings and Recommendations." Plaintiff is advised that failure to file
4 objections within the specified time may result in the waiver of rights on appeal. Wilkerson v.
5 Wheeler, 772 F.3d 834, 838-39 (9th Cir. 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394
6 (9th Cir. 1991)).

7 Additionally, IT IS ORDERED that the Clerk of Court is directed to assign a district
8 judge to this case.

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10 IT IS SO ORDERED.

11 Dated: September 30, 2021

/s/ Eric P. Groj

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13 UNITED STATES MAGISTRATE JUDGE

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